Piedmont Properties, Inc. d/b/a Hempstead Motor Hotel *and* Local 32B-32J Service Employees International Union, AFL-CIO. Cases 29-CA-10056 and 29-RC-5781

30 April 1984

DECISION, ORDER

AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 15 December 1983 Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, to adopt the recommended Order, and to issue a Certification of Results of Election.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Local 32B-32J, Service Employees International Union, AFL-CIO, and that it is not the exclusive bargaining representative of these bargaining unit employees.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. The hearing in the above matter took place on October 11, 1983.

On November 9, 1982, Local 32B-32J, Service Employees International Union, AFL-CIO, herein called the Union, filed an unfair labor practice charge (Case 29-CA-10056) against Piedmont Properties, Inc. d/b/a Hempstead Motor Hotel, herein called Respondent. On December 30, 1982, the Regional Director for Region 29 issued a complaint alleging various independent violations of Section 8(a)(1) of the Act.

On September 16, 1982, the Union filed an RC petition (Case 29-RC-5781) in connection with certain part-time maintenance employees employed by Respondent. Pursuant to a Stipulation for Certification Upon Consent Election, an election was held on November 5, 1982. As a result of the election, the Union did not receive a majority of the valid votes cast. Thereafter, timely objections were filed by the Union. On January 12, 1983, the Regional Director for Region 29 issued a Report on Objections ordering a hearing on certain objections.

On May 26 the above complaint and hearing on objections were consolidated. The 8(a)(1) allegations and the objectionable conduct alleged are coextensive.

All parties were represented at the hearing and were accorded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs. Briefs were filed by Respondent.

On consideration of the entire record, the briefs, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New York corporation engaged in the operation of a motor hotel in West Hempstead, New York. In the course of the operation of its motor hotel, Respondent annually derives gross revenue received from room rentals exceeding $500,000. Additionally, Respondent annually purchases heating oil, electricity, and other goods and services valued at an excess of $50,000 directly from States of the United States other than New York.

Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

FACTS OF THE CASE

For a number of years the Union has had a collective-bargaining agreement with Respondent covering its full-time maintenance employees.

Sometime during the latter part of the summer of 1982, the Union commenced organizing the part-time maintenance employees employed by Respondent. The Union's organization campaign was conducted by union business agent Charles Brown, who was also the Union's agent administering the collective-bargaining agreement on behalf of the Union.

On September 16, 1982, the Union filed an RC petition in Case 29-RC-5781. Thereafter the parties entered into a Stipulation for Certification Upon Consent Election in a unit consisting of all regular part-time building service employees including maids, laundry employees, porters, and maintenance employees.

On November 5, 1982, an election was conducted at Respondent's motor hotel. Of nine eligible voters, eight voted. The vote was four employees voted in favor of representation by the Union and four employees voted for no representation by any labor organization.

Thereafter, as set forth above, the Union filed timely objections to the conduct of the election, and unfair labor practice charges.

Mildred Brown-Stanly, a part-time maid and a unit employee employed by Respondent, testified on direct examination that sometime during the last week in October 1982, as she passed the check-in desk by the lobby, she had a conversation with Leon Zwelsky, Respondent's night manager, and an admitted supervisor within the meaning of Section 2(11) of the Act. During this conversation, Zwelsky told Brown-Stanly that if the Union came in the employees would no longer be able to do the things they were doing at the present time. Brown-Stanly asked him what he meant and he replied that employees might not be able to leave early when they finished their assigned work.

Respondent's practice had been to permit its part-time employees to leave work early on completion of their assigned work.

On cross-examination, Brown-Stanly admitted that during this conversation the subject of potential negotiations in the event the Union won the election came up and, in this connection, Brown-Stanly testified that Zwelsky said the Union could demand during such negotiations that part-time employees not be allowed to leave early.

Leon Zwelsky testified that he had no individual conversation with Brown-Stanly or any other employee concerning the Union. However, he did conduct several meetings where he spoke to the assembled employees concerning the Union. He testified that at one such meeting, a part-time employee, he could not recall who, asked about Respondent's practice of permitting its part-time employees to leave early on completion of their assigned work. He replied that if the Union came in there would be negotiations and this practice could be subject to negotiations. He said he could speak to the Union about it, but it was possible they might not look favorably on it.

In view of my favorable impression as to Zwelsky's credibility and in view of Brown-Stanly's admission on cross-examination which generally corroborates Zwelsky's testimony, I credit Zwelsky's testimony.

Ruby Carter, a part-time maid, and a unit employee employed by Respondent, testified that about an hour after the election was held[1] she heard Ms. Bethea, a part-time maid and unit employee employed by Respondent, ask Leon Zwelsky, "Are you going to pay me off the books," and that Zwelsky replied, "I guess I have to adopt you." Carter's testimony is corroborated by the testimony of Brown-Stanly. Zwelsky testified that he did not recall making such statement.[2]

In view of the mutually corroborative testimony of Carter and Brown-Stanly and the inability of Zwelsky to recall the alleged conversation, I credit the testimony of Carter and Brown-Stanly concerning the November 5 conversation between Zwelsky and Bethea.

Zwelsky testified that Bethea was an elderly employee in poor health and that she had requested him several times before the election to pay her off the books so that she would be eligible for unemployment benefits. Zwelsky told her he could not do this. Several weeks after the election Bethea quit Respondent's employ.

There was no evidence submitted by the General Counsel to establish that Bethea was ever paid off the books, at any time during her employ with Respondent. Bethea was not called as a witness by the General Counsel.

Charles Brown, union business agent, testified that he services Respondent's full-time employees pursuant to the terms of the parties' collective-bargaining agreement. In connection with this service, he periodically visits Respondent's motor hotel and meets with unit employees. In this connection, the collective-bargaining agreement provides:

> Authorization representatives of the Union shall have admission to the establishments of the Employers, but such representatives shall make arrangements with the management as to the time of making such vists.
>
> Conferences held between Union representatives and the employees shall not interfere with or interrupt the work of the employees; and if held on the premises, such conferences must be within a place arranged for with the management.[3]

On November 5, 1982, about 8 p.m., about an hour before the scheduled election, Brown, accompanied by union representative Clyde Hayes, visited Respondent's facility to speak with the Union's election observer. Respondent was evidently aware of this planned visit and had made one of their guest rooms on the first floor next to the lobby available to the Union for this purpose. Brown and Hayes met briefly with the Union's observer, employee Beverly Brim, in the guest room. Brown and Hayes then left the room and waited in the lobby, an area of about 10 by 15 feet, for the arrival of the Board agent. As he stood in the lobby with Hayes, Leon Zwelsky came over and told him that he did not want him wandering through the hotel and disturbing employees. Zwelsky then left the lobby area. Within the next few minutes the part-time employees who were eligible to vote began filtering in the lobby waiting for the polls to open. At this time, the Board agent and Respondent's counsel had not yet arrived.[4]

Brown and Hayes testified that Zwelsky reappeared in the lobby area several minutes later. At this time seven

[1] The election was held on November 5, 1982, at Respondent's facility between the hours of 9 a.m. to 10 p.m.

[2] Carter testified that during the first week in November 1982, before the election, Bethea had told her that Zwelsky had said that when the Union came in Respondent would no longer be able to pay Bethea off the books. This testimony was objected to by Respondent as hearsay. The objection was sustained.

The Regional Director's report on objections indicates that Bethea was contacted by the Board agent conducting the investigation. Although Bethea refused to give an affidavit she orally denied such conversation with Zwelsky took place or that Zwelsky ever promised to pay her off the books.

[3] Art. XI of the collective-bargaining agreement.

[4] The actual voting area set forth in the stipulation was Respondent's "basement linen room."

or eight of the nine eligible voters were also present in the lobby area, milling about. At this time, Zwelsky accused Brown of talking to the voters. He told Brown he wanted him off his property or he was going to call the police. Brown told Zwelsky he had a right to be there and suggested to Zwelsky that he go back to his desk and leave him alone. Zwelsky did not call the police and Brown and Hayes remained in the area without further incident until the Board agent arrived.

The General Counsel did not question witnesses Brown-Stanly or Carter concerning this incident, nor were they questioned as to this incident on cross- examination. The General Counsel did not call other employee witnesses to testify concerning this incident. Neither Respondent nor the General Counsel questioned Zwelsky concerning this issue.

Brown and Hayes left the facility following the Board agent's preelection instructions. They returned to the facility for the election count.

Analysis and Conclusions

In connection with the complaint which alleges that Zwelsky threatened its employees with stricter enforcement of work rules the credible evidence established that, during a meeting called by Respondent to discuss the pending union campaign, an employee, presumably Brown-Stanly, questioned Zwelsky concerning Respondent's practice of permitting its part-time employees to leave work early, after completion of their assigned job tasks. Zwelsky's reply was that if the Union came in there would be negotiations and this practice would be subject to such negotiations. He further stated he could speak to the Union about it (an apparent implication that he would continue to support the practice) but it was possible the Union might not look favorably on such practice.

The Board recently held in *Rexall Corp.*, 265 NLRB 121 (1982), an employer does not violate Section 8(a)(1) when he informs employees of changes that might occurr as the result of collective bargaining if he does not reasonably imply that he intends to make such unilateral changes should the union come in, predict directly, or by implication what impact unionization would have on the employer or employees, or threaten employees with reprisals. This case concerned among other employer practices, the practice whereby employees were allowed to leave work 5 minutes early to catch a bus. In this connection, an employer representative, during a conversation with an employee about the practice, told the employee that such benefit would become a negotiable item if the union were to win an election. The Board, applying the rationale discussed above, reversed the administrative law judge and concluded that the employer did not violate Section 8(a)(1) by such conduct.

In the instant case Zwelsky merely stated that the practice of allowing employees to leave early *could* become the subject of negotiations. He did not state or imply that the practice *would* be subject to negotiations. Moreover, he implied that he would support continuation of the practice in the event it came up during collective-bargaining negotiations. Under these circumstances I conclude that Respondent did not violate Section 8(a)(1) by such conduct.

The complaint further alleges that Respondent offered benefits to employees in the form of payments to employees off the books in order to induce them to refrain from supporting the Union. In this connection the admissible evidence established that immediately following the election employee Bethea asked Zwelsky if he would pay her off the books. Zwelsky replied, "I guess I have to adopt you." The evidence further established that prior to the election Bethea had on several occasions requested that Zwelsky pay her off the books and each time he had refused to do so. Further, there was no evidence that Respondent, at any time, had actually paid Bethea off the books. Moreover, as noted above, Bethea, in connection with the investigation of the objections herein, orally denied that Zwelsky ever promised to pay her off the books. In view of Respondent's prior practice of refusing to pay Bethea off the books, notwithstanding her repeated requests, the absence of any evidence she ever received any payment off the books and the ambiguous statement by Zwelsky to Bethea after the election, "I guess I have to adopt you," I conclude there is insufficient evidence to establish that Respondent violated Section 8(a)(1) as alleged.

The complaint further alleges Respondent violated Section 8(a)(1) by threatening to arrest union organizer Brown. In this connection the evidence established that, about 40 minutes prior to the election and before the arrival of the Board agent conducting the election, union agents Brown and Hayes were present in the Respondent's lobby with about seven of the eight voters voting in the election. According to Zwelsky, Brown was talking to the voters. Brown denied this. I find it unnecessary to resolve this credibility issue. The evidence further established that Zwelsky accused Brown of talking to the employees and told him he wanted him off his property or he was going to call the police. However, the General Counsel failed to produce any employee who testified they overheard Zwelsky's statements to Brown. In this connection, employees Brown-Stanly and Carter, witnesses called by the General Counsel, were not questioned concerning this incident. Nor was any evidence illicited that the employees were later informed of Zwelsky's statement. There is then no evidence to establish that any employee overheard or subsequently became aware of Zwelsky's statement. The gravamen of the violation alleged is that such statement discouraged employees from becoming members of or supporting the Union and therefore interfered with, restrained, and coerced employees in the exercise of their Section 7 rights. If the employees were unaware of such statement, assuming such statement was otherwise unlawful, their Section 7 rights could hardly be interfered with. The Board held in *W. T. Grant Co.*, 209 NLRB 244 (1974), that where the record did not reveal evidence that employees overheard or became aware of a threat by an employer official to arrest a union official, an 8(a)(1) violation could not be found.

Accordingly, I conclude that Respondent by Zwelsky's conduct did not violate Section 8(a)(1).

Moreover, I do not find Zwelsky's conduct to be unlawful. Brown had no right to be present in the lobby prior to the arrival of the Board agent conducting the election. He had received permission to utilize a guest room for the purpose of conferring with his observer but this did not permit his presence in the lobby. Nor did the provision in the collective-bargaining agreement providing for union visitation rights at Respondent's facility extend such right to Brown. Such clause relates to the right of union representatives to come on Respondent's facility to discuss issues relating to working conditions with *unit employees covered by the contract.* It does not extend the right of a union representative to come on Respondent's facility to meet with *nonunit employees for any purpose.* Since it is clear that Brown and Hayes were not present in the lobby to speak with *unit employees,* I conclude Zwelsky could ask Brown to leave the lobby and to tell him when he resisted that he would call the police. In any event, Brown and Hayes did not leave, but remained in the lobby without further incident until after the Board agent arrived and had the usual preelection conference with all parties present. At that time, all parties departed so that the election could be conducted. Under these circumstances, I would conclude that the incident would not have interfered with, coerced, or restrained employees concerning their Section 7 rights or affected the voting in the election. Cf. *Harvey's Resort Hotel,* 236 NLRB 1670 (1978); *Howard Johnson Co.,* 242 NLRB 386 (1979).

CONCLUSIONS OF LAW

Based on my findings of fact and on my analysis of such findings, I have concluded that Respondent has not violated Section 8(a)(1) of the Act as alleged.

The Representation Proceeding

The objections filed in connection with this proceeding were coextensive with the unfair labor practices alleged.

I further conclude in view of my findings and analysis of such findings, as set forth above, that Respondent did not engage in objectionable conduct.

In view of my findings and conclusion set forth above, and the entire record in these proceedings, I hereby issue the following recommended[6]

ORDER

The complaint is dismissed in its entirety.

IT IS FURTHER RECOMMENDED that a Certification of Results of Election in Case 29-RC-5781 issue.

---

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.